IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 197.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CROMPTON-HIGHLAND MILLS, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

Of Crompton-Highland Mills, Inc.
(Hereinafter Called Respondent).

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JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 5, 1948 (R. 127), as follows, towit:

"This cause came on to be heard on the petition of the National Labor Relations Board for the enforcement of an order of the National Labor Relations

Board made on August 21, 1946, as amended on August 26, 1946, "In the Matter of Crompton-Highland Mills, Inc., and Textile Workers Union of America, C. I. O.," Case No. 10-C-1812, and was argued by counsel:

"On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the National Labor Relations Board in this cause be, and the same is hereby denied."

The opinion of said Court (R. 124-126) is reported at 167 Fed. (2) 662.

We shall endeavor to demonstrate that the judgment was correct and should be affirmed. We shall not attempt to sustain all of the dicta in the opinion.

The Intermediate Report of the Trial Examiner of the National Labor Relations Board, hereinafter called the Board, was issued on March 25, 1946 (R. 69-106). The Decision and Order of the Board was issued on August 21, 1946 (R. 59-68), amended on August 26, 1946 (R. 110-111) and corrected on September 5, 1946 (R. 112-113).[1]

JURISDICTION.

A petition for a Writ of Certiorari was granted, and the Writ was issued, on October 11, 1948 (R. 129).

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[1] References to Volume I of the printed Transcript of Record are designated "R."

The appendix to Respondent's brief in the Circuit Court has been reprinted at pages 164-191 of Volume II of the Transcript of Record, and references thereto are designated "R. A."

QUESTIONS PRESENTED.

The statements of the questions presented, at p. 2 of Petitioner's brief, are not attuned to the facts of the case and are therefore inaccurate and misleading.

I.

The question stated in paragraph 1, p. 2, of Petitioner's brief is inaccurate and misleading because considerably more than "an impasse in bargaining negotiations" occurred. The Union, without fault of Respondent, terminated the bargaining, first on October 18, 1945, again, after resumption, on November 8, 1945, and finally and completely, without then or thereafter indicating any desire or intention of ever resuming bargaining, on December 19, 1945; and no bargaining was pending, requested or anticipated when the complained of wage increase was made. Respondent had demonstrated a sincere desire to agree upon a contract and a willingness to bargain in complete good faith whenever requested to do so; and the situation complained of would not have arisen if the Union had accepted the proposals for further bargaining which were made by Respondent during the bargaining.

Respondent therefore respectfully submits that the **primary question at issue** is more accurately stated as follows:

Whether Respondent refused to bargain with the Union by unilaterally increasing its wage rates on January 1, 1946, after collective bargaining, which commenced on August 31, 1945, and continued with more than usual success through October 17, 1945, had been broken off and terminated by the Union, without fault of Respondent, first on October 18, 1945; again, after resumption, on No-

vember 8, 1945, and finally and completely on December 19, 1949, and where no further collective bargaining was pending, requested or anticipated when said wage increase was made, and Respondent had demonstrated a sincere desire to agree upon a contract and a willingness to bargain in complete good faith whenever requested to do so, and the situation complained of would not have arisen if the Union had accepted the proposals for further bargaining which were made by Respondent during the bargaining.

II.

The questions stated in paragraphs 2 and 3, p. 2, of Petitioner's brief, while somewhat attuned to dicta in the Opinion of the Circuit Court, are not at all related to the facts of the case, or to the contentions of Respondent, or to the actual judgment of the Circuit Court. The answer to both of said questions is quite obviously "No," and Respondent does not contend, and has not ever contended, to the contrary. It may be that the erroneous dicta in the Opinion of the Circuit Court should be corrected. It surely is that the merits of the case should not get lost in the process.

The questions at issue in this regard are subsidiary to the primary question above stated, and, so far as concerns the proper disposition of the case, need not be considered unless the above stated primary question is determined adversely to the contention of Respondent.

Respondent respectfully submits that these subsidiary questions should be stated substantially as follows, to-wit:

A. Assuming, contrary to Respondent's contentions, that the order of the Board was properly issued, should said order be enforced where, after the issuance of said

order and before the filing of the petition for enforcement, the parties bargained to agreement on a complete contract and the Union, by refusing to sign the contract which was agreed upon, made further compliance with said order unreasonable if not impossible.

B. Should Respondent be afforded opportunity, somewhere, to prove the facts alleged and relied upon.

III.

There is another **subsidiary, but very important question** which is not mentioned in Petitioner's brief, to-wit:

Should the order, if enforced, be modified so as to restrict it to the only unfair labor practice found to have been committed, namely, making a general increase in wage rates without consulting the Union;

Or, stated differently but to the same effect,

Should an employer be enjoined from doing what it has not done or given any indication of intending or of being apt to do; or ordered to do what, before the issuance of said order, it had willingly and in good faith done.

STATEMENT OF THE CASE

PERTINENT FACTS.

The statement of the case, at pages 3-18 of Petitioner's brief, omits mention of the facts which are controlling, includes facts which are immaterial, distorts certain of the facts which are stated, and is skillfully misleading.

To avoid confusion the statement of the post-hearing facts alleged and relied upon, and which we seek leave to prove, in support of Respondent's contentions with respect to the subsidiary questions (II) stated at pp. 4-5 above, will be confined to the section of this brief in which said questions are argued, infra, pp. 43 to 52; and the present statement will be confined to facts which appear, without contradiction, from the record now before the Court.

The following are the undisputed and indisputable facts, and the only facts, which are necessary to a determination of the primary question (I) stated at page 3 above, and the subsidiary but very important question (III) alternatively stated at page 5 above.

Respondent Sincerely Tried to Agree With the Union Upon a Contract.

The bargaining authority of the Union was certified by the Board on August 13, 1945 (R. 72) and collective bargaining negotiations were commenced, by mutual agreement, on August 31, 1945 (R. 76). The Union's contract proposal was submitted to Respondent in advance of the first bargaining conference and Respondent's counter-proposal (Respondent's Exhibit 3) was submitted to the Union at the first bargaining conference on August 31, 1945 (R. A. 166-168).

A Stipulation of Counsel with respect to Respondent's Exhibits 3, 4 and 2 is set forth in Respondent's appendix at pages 166-168 thereof, and should be referred to in connection with all references to said Exhibits. Said Exhibits are a graphic account of the bargaining negotiations and therefore merit careful consideration, although not mentioned in Petitioner's brief.

Said Exhibits have not been printed as a part of the record. By order of the Circuit Court, the Clerk of that Court certified the original Exhibits as a part of the documentary evidence which was considered by the Circuit Court and the original Exhibits are now on file in the office of the Clerk of this Court. Pursuant to the "Stipulation as to the Record" (R. 130), nine photographic copies of said Exhibits have been made available to this Court.

Respondent's Exhibit 3 is a copy of the contract which Respondent proposed to the Union at the first bargaining conference on August 31, 1945. The interlineations, deletions and attached riders show the concessions and alterations which Respondent agreed to in collective bargaining, and the marginal dates are the dates on which collectively bargained agreements were reached on the various sections as modified (R. A. 166-168).

So many changes in Respondent's original proposal were agreed upon in collective bargaining that the bargaining representatives of both parties encountered difficulty in keeping up with them. To facilitate further bargaining, Respondent prepared, and on October 12, 1945 presented to the Union, a memorandum of the contract provisions which had, up to that time, been agreed upon and of Respondent's proposals as to the provisions which had not been agreed upon (R. A. 168). **Respondent's Exhibit 4 is a copy of this memorandum.** The typewritten

marginal dates are the same as the marginal dates on Respondent's Exhibit 3 and are the dates of the agreements made in collective bargaining prior to October 12, 1945. The interlineations, deletions and attached riders, and the red pencil marginal dates, show the changes agreed upon, and the dates on which agreements were reached in collective bargaining, after October 12, 1945 (R. A. 168).

Respondent's Exhibit 2 was identified out of order at the request of the Board's attorney and logically should follow Respondent's Exhibits 3 and 4 (R. A. 166-168). It is a copy of an amendment of Respondent's proposal with respect to "Wage Rates and Work Assignments" (Art. II of Respondent's Exhibits 3 and 4) which Respondent submitted to the Union on November 7, 1945. The record shows without dispute that the Union rejected the amended proposal without even looking at it (R. A. 176); and the Board, reversing the Trial Examiner, found that Respondent bargained with the Union in good faith with respect to the controverted incentive wage plan and work assignments under said plan (R. 60, 61-62; infra, pp. 54 to 55).

Respondent's Exhibits 3 and 4 show, very clearly, that the parties bargained with more than usual success from August 31, 1945 through October 17, 1945.

If, in examining Respondent's Exhibits 3 and 4, the Court will remember that the failure to reach agreement with respect to Art. II thereof cannot possibly be charged to Respondent, since the Union rejected Respondent's amended proposal (Respondent's Exhibit 2) without reading it (R. A. 176), an examination of Respondent's Exhibits 3 and 4 will, we are confident, convince the Court that Respondent bargained with the Union in complete

good faith; in a sincere effort to agree upon a contract, and almost succeeded in its effort to persuade the Union to agree upon a contract.

The above, we submit, is the background against which all other facts should be considered, and without an appreciation of which the questions at issue cannot be properly evaluated or determined; and we earnestly request that the Court carefully examine Respondent's Exhibits 3 and 4.

The Union, Without Fault of Respondent, Terminated the Bargaining, First on October 18, 1945, Again, After Resumption, on November 8, 1945, and Finally and Completely, Without Then or Thereafter Indicating Any Desire or Intention of Ever Resuming It, on December 19, 1945; and No Further Bargaining Was Pending, Requested or Anticipated When the Complained of Wage Increase Was Made.

Respondent respectfully submits that these are the controlling facts in the case and that everything else is either background or collateral thereto. The testimony regarding these facts (R. A. 174, 177-178, 180, 183-187) was positive and uncontradicted.

The Union first terminated the bargaining, and gave notice of its intent to strike, on October 18, 1945 (R. A. 174, 183-187).

Respondent regarded this termination of the bargaining, and the accompanying strike threat, as bargaining strategy (R. A. 174-175, 186)—what Petitioner refers to as a bargaining impasse.

Further bargaining conferences were convened on November 7, 1945, and continued through November 8, 1945 (R. A. 175-178).

The Union terminated the bargaining again on November 8, 1945 (R. A. 177-178, 184, 187). Respondent did not regard this as bargaining strategy, but believed that it was a sincere and final breaking off and termination of the bargaining negotiations (R. A. 177).

A further bargaining conference was however requested and held on December 19, 1945 (R. A. 178). The Union again terminated the bargaining on December 19, 1945, this time finally and completely; and no further bargaining was thereafter requested or anticipated (R. A. 180, 184, 187).

The record references hereinabove made are all to the testimony of Respondent's witness. Neither the Union nor the Board offered any evidence regarding the terminations of the bargaining on October 18, 1945, and November 8, 1945, except as to the October 18 and 22, 1945, notices of the intent to strike.

Respondent's testimony as to the final termination on December 19, 1945, was, however, fully corroborated by the testimony of Mr. Douty, on examination by the Trial Examiner, as follows (R. A. 170), to-wit:

> "Q. (By Trial Examiner Rogosin): Mr. Douty, was December 19 the date of your last bargaining conference with the company in this case?
>
> A. Yes, sir.
>
> Q. Well, what was the position of the parties at the conclusion of that conference on December 19? **Was it contemplated that the parties should meet again with respect to wage proposals?**
>
> A. **Not particularly.** I mean, we broke up not having reached agreement on these points, and our situation at the end of the meeting was one of stalemate on these particular points in dispute." (Emphasis added.)

Considering the issues and his interest, Mr. Douty could not have been expected to more forthrightly admit that the bargaining was completely and finally terminated on December 19, 1945, and that no further bargaining was then contemplated or intended. It is certainly true (R. A. 180, 184, 187) that Respondent believed, and was fully justified in believing, that the Union had completely terminated the bargaining, and that no further bargaining was intended or contemplated.

Neither the Union nor the Board has ever contended, nor does Petitioner contend, that any resumption of bargaining was requested, or that any desire or intention to resume bargaining was in any way indicated by the Union, after December 19, 1945.[2]

Neither the Trial Examiner nor the Board made any clear-cut finding of fact as to when, why or by whom the bargaining was terminated. The Board simply said (R. 113) "Nor are we impressed with the respondent's attempted justification for its action on the ground that the Union broke off negotiations on December 19, and that respondent was therefore relieved of the obligation to deal with it."

In the absence of a clear-cut finding of fact, this was, we submit, an admission, and tantamount to a finding, that the Union did break off and finally terminate the bargaining on December 19, 1945.

We submit also that, in the absence of any finding of fact to the contrary, the above referred to positive, uncontradicted, corroborated testimony of Respondent's witnesses should be accepted as true.

[2] Bargaining negotiations were resumed at the request of Respondent (infra, pp. 43 to 52) after the hearings before the Trial Examiner and before the strike commenced, but the facts here being stated are confined to the facts appearing from the record of the hearings before the Trial Examiner.

We submit therefore that although we cannot point to any finding of fact by the Board (no finding pro or con having been made by the Board) the record clearly shows that the Union, without fault of Respondent, terminated the bargaining, first on October 18, 1945, again, after resumption, on November 8, 1945, and again, this time finally and completely, on December 19, 1945; that the Union did not then or thereafter request that the bargaining be resumed or in any way indicate any desire or intention to ever resume the bargaining which it had terminated; and that no further bargaining was pending, requested or anticipated when the complained of wage increase was made on January 1, 1946.

Respondent Resumed and Continued Bargaining Notwithstanding the Threat of Strike and at All Times Demonstrated a Willingness to Bargain in Good Faith Whenever Requested to do so.

The bargaining conferences from August 31, 1945 through October 18, 1945 were arranged for by mutual agreement, and to the mutual satisfaction, of the parties (R. A. 169-170).

Informal notice of the Union's intention to call a strike was given at the termination of the bargaining conference which was held on October 18, 1945 (R. A. 174). Formal notice of the intent to strike was filed four days later on October 22, 1945 (R. A. 87).

The conferences which were held on November 7, and 8, 1945, were convened at the request of a Commissioner

* While this fact does not appear from the record now before the Court, the Court should know that the threatened strike did not commence until April 18, 1946, two months after the hearings before the Trial Examiner were completed, and after Respondent had initiated a resumption of the collective bargaining negotiations and had made substantial additional progress in its effort to persuade the Union to make a contract. (See infra, pp. 43 to 52.)

of Conciliation of the United States Department of Labor and not at the request of the Union (R. A. 175, 171). Respondent willingly resumed negotiations in response to this request (R. A. 173), and, in a "second mile" effort to reach agreement with the Union, made substantial concessions from its previous bargaining insistencies (R. A. 175-177, 179, 185).

Two of the things which occurred at these conferences should adequately illustrate the truth of the statement just made.

The only objections expressed by the Union to Respondent's initial proposal with respect to the incentive wage plan (Art. II, Sec. 3, p. 5 of Respondent's Exhibit 4) arose from Respondent's insistence that disputes as to work loads and work assignments under said plan (the amount of work to be done for the wage agreed upon), should, like wage disputes, be adjusted through collective bargaining and conciliation, and the Union's insistence that such disputes should be settled by arbitration (R. A. 175-176).

At the conference on November 7, 1945, Respondent acceded to the Union's demands and submitted to the Union (Respondent's Exhibit 2, Sec. 3, at the next to the last page) a proposal for the arbitration of all such disputes. Respondent also submitted to the Union a schedule of the average hourly earnings under the wage plan, which the Union had requested (R. A. 175). The Union rejected the arbitration proposal (Respondent's Exhibit 2) without reading it (R. A. 176) and, without looking at it, said that the schedule of average earnings was not the information which it wanted and that it was not satisfied with it (R. A. 175).

[1] See N. L. R. B. v. Columbia Enameling Co., 306 U. S. 292, 83 L. Ed. 660, footnote 2.

Instead of considering Respondent's amended proposal with respect to the incentive wage plan (Respondent's Exhibit 2), Mr. Douty, for the International Union, proposed that the Union would support the incentive wage plan (opposition to which had admittedly precipitated the organization of the Local Union) (R. A. 172) if Respondent would agree to require the employees who were then members of the Union to maintain membership in and pay dues to the Union; and gave notice that the Union would do everything in its power to discredit and destroy the wage plan unless Respondent would agree to include in the contract provisions for the security of the Union and the check-off of its dues. Respondent, as in simple honesty it should have, rejected this proposal.[3]

In an effort to solve the controversy as to whether membership in and support of the Union should be voluntary or compulsory, Respondent, at the suggestion of the Conciliator (R. A. 179), offered to issue two checks to each employee on the first pay day in every month, one check for the amount of the Union's dues and the other for the balance of the employee's wages; and to provide in each department of the Mill a conveniently located stamp for endorsement to the order of the Union and a locked box in which the employees could deposit checks for delivery to the Union (R. A. 179). The Union rejected the proposed compromise and insisted that the checks for the amount of its dues be drawn directly to its order (R. A. 179), so as to avoid the possibility that the employees

[3] Respondent's witnesses all testified to the facts above set forth (R. A. 177, 183, 186-187). Four of the eight employee members of the Union Bargaining Committee took the stand in rebuttal, but none of them contradicted this testimony. Mr. W. J. Moore, an employee member of the Union Bargaining Committee, corroborated Respondent's testimony in this regard (R. A. 189-190). The Trial Examiner did not make any finding of fact with respect to this corroborated testimony, and the Board entirely ignored Respondent's Exceptions, on that account, to the Intermediate Report of the Trial Examiner (R. 24, 47-48). The Board did hold (R. 60 & 62; infra, pp. 54 to 55) that Respondent bargained with the Union in good faith with respect to the incentive wage plan.

might be unwilling to endorse the checks and drop them in the box for delivery to the Union.

The Board did not make any findings, pro or con, as to whether Respondent continued to bargain with the Union notwithstanding the threat of strike, or as to whether Respondent demonstrated a willingness to bargain in good faith whenever requested to do so.

Here again we say that in the absence of any finding, pro or con, by the board, the Court must of necessity look to the evidence for the facts. The true facts, and the contentions of one of the parties, should not be ignored merely because the Board, in issuing the order which it seeks to enforce, failed to make any finding, pro or con, with respect thereto.

Respondent Bargained With the Union in Good Faith With Respect to Wages and the Situation Complained of Would Not Have Arisen if the Union Had Accepted the Proposals for Further Bargaining With Respect to Wages Which Were Made by Respondent During the Bargaining.

Respondent admits that the Union, throughout the bargaining negotiations, repeatedly proposed a wage increase of 5c per hour for all employees (R. A. 172) and that Respondent, throughout the bargaining negotiations, from August 31, 1945 through December 19, 1945, refused to grant any wage increase.[6] The bargaining with respect to wages was none the less in good faith.

[6] Shortly before the organization of the Union, Respondent, with War Labor Board approval, made general wage increases aggregating 10c per hour. The War Labor Board insisted that these increases be added as hourly rates to the earnings under the incentive wage plan, and refused to permit Respondent to work these increases into its incentive rates, because the resulting increases in incentive earnings would have exceeded the increases which the Board was then permitting textile mills to make.

When the parties met on December 19, 1945, wage controls had been lifted, and Respondent therefore offered to work these increases into the

Each time the requested wage increase was discussed Respondent fully explained and justified its unwillingness and refusal to grant any wage increase by demonstrating to the Union that the wages which Respondent was then paying were already higher than the wages then being paid by the other comparably situated mills (R. A. 165-166, 169, 170, 172-182, 188) and were higher in fact than the "permissible rates" or "guide rates" which had just recently been established by the War Labor Board for Southern textile mills (R. A. 165-173).[7]

Respondent made four counter-proposals with respect to wages.[7]

1. Throughout the bargaining Respondent repeatedly admitted doubt as to whether the guaranteed minimum rates under the incentive wage plan were properly related to the remainder of the existing schedule of rates, suggested that the parties should, in bargaining, agree upon a rescheduling or realignment of the guaranteed minimum rates; and endeavored to persuade the Union to make some proposal in that regard; but the Union refused to do so (Board's Appendix p. 54).

The probability of a general increase in wage rates throughout the textile industry, particularly in the South,

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incentive rates. The effect would have been to increase the average incentive earnings approximately 2c per hour.

The attempt of the Board and Petitioner to treat this as a counter-wage-proposal is completely unjustified and misleading.

Respondent did not make this offer as or in lieu of a general increase. Respondent still proposed contract provisions for further bargaining with respect to wages at any time and reiterated the promise that it would increase its wage rates whenever the other mills with which it competed increased theirs.

This offer could and should have been accepted without prejudice to further bargaining as proposed by Respondent. It was rejected because the Union was by then bargaining for its own security to the exclusion of bargaining for the benefit of the employees, and the Union was afraid that any increase in earnings would lessen interest in the strike which the Union was trying to promote.

7 See footnote 6, p. 15.

was contemplated and frequently discussed," and Respondent, throughout the bargaining:

2. Reminded the Union that Respondent had always been among the first of the comparably situated mills to make any wage increase, and promised the Union that Respondent would increase its wage rates whenever and as soon as the other mills in the locality increased theirs (R. A. 165, 166, 170, 173); and

3. Offered to provide in the contract that the contract might be reopened for further bargaining with respect to wages at any time (R. A. 166, 170 and Sec. 2 of Art. II of Respondent's Exhibits 3, 4 and 2).

4. Respondent also proposed that a schedule of its then existing hourly and incentive wage rates be attached to and made a part of the contract; and, on November 7, 1945, Respondent offered to agree "that the rates and earnings, as shown by said schedule, will not be increased or reduced during the term of this contract unless as a general increase or reduction in wage rates is agreed upon in collective bargaining" (Respondent's Exhibit 2, Sec. 1. See also R. A. 174).

Respondent also acceded to the Union's insistence that disputes regarding work loads ("Point Standards") and work assignments under the incentive wage plan (which is to say, disputes as to the amount of work to be done for the agreed upon rate of pay) should be submitted to arbitration if not adjusted to the mutual satisfaction of both parties (Respondent's Exhibit 2, Sec. 3, next to the last page).

The parties did not have to, and did not, agree; but the situation complained of would not have arisen if the Union,

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8 The concentration of the textile industry in the South is such that wage adjustments, once started, spread through the industry with great rapidity.

instead of terminating the bargaining, had accepted the contract which Respondent proposed. Instead, the Union rejected the amended wage proposals contained in Respondent's Exhibit 2 without reading them (R. A. 176) and terminated the bargaining negotiations as above set forth.

This, then, was the situation with respect to wages which existed when the Union terminated the bargaining negotiations:

a) The Union had repeatedly proposed, and Respondent had just as repeatedly explained and justified its unwillingness to then grant a general wage increase of 5¢ per hour (R. A. 165-166, 169, 170, 172-173, 188);

b) Respondent had bargained with the Union in good faith with respect to the incentive wage plan, objections to which had admittedly caused the employees to affiliate with the Union (R. 60, 61-62, infra, pp. 54 to 55) (R. A. 172);

c) Respondent had offered to contract that the wage rates then in effect would not be increased or decreased unless and until a general adjustment in wage rates was agreed upon in collective bargaining (Respondent's Exhibit 2, Sec. 1);

d) Respondent had also offered to include in the contract provisions whereby the contract could be reopened for further bargaining with respect to wages at any time (Sec. 2 of Art. II of Respondent's Exhibits 3, 4 and 2; R. A. 166, 170); and

e) Respondent had repeatedly promised the Union that Respondent would maintain its position of paying wage rates a bit higher than those paid by the other Mills in the locality and would increase its wage rates whenever and

as soon as the other Mills increased theirs (R. A. 165, 166, 170, 173).

No impasse existed and the situation complained of would not have arisen if the Union, instead of breaking off and terminating the bargaining negotiations, had accepted the proposals which Respondent made.

All That Respondent Thereafter Did Was What It Had Repeatedly Informed, Promised and Assured the Union That It Would Do.

We submit that the facts surrounding the making of the complained of wage increase are merely collateral to the questions at issue; but they should be stated.

A general wage increase of 5¢ per hour spread throughout the textile industry in the Southern States during the last week in December 1945 (R. A. 181, 187-188).[9]

While the probability of such a wage increase had been anticipated during the bargaining negotiations, neither Respondent nor apparently the Union had anticipated that it would come so quickly. Respondent first learned that the other Mills with which it competed for labor were about to increase their wage rates on December 29 or 30, 1945. These facts were proven and were not contradicted (R. A. 187-188). If the Union, through its contacts with other Mills, had any advance notice of the wage increase, it did not impart the information to Respondent. The record is silent in this regard.

The textile industry is the principal industry in the closely-knit Griffin, Georgia, labor market area; the demand for then greatly exceeded the supply of qualified

9 See footnote 8, p. 17.

workers; and the competition for employes was keen (R. A. 181, 187-188).

In order to maintain its competitive and historical position of always paying wages rates somewhat higher than those paid by any of the other Mills, it was necessary that Respondent immediately make substantially the same increase as was being made by the other Mills in the locality (R. A. 181, 187-188). Respondent had always been among the first of the competing mills to make any wage increase, and desired to maintain that position (R. A. 165-166, 169, 170, 172-173, 181, 187-188).

Respondent had, throughout the bargaining, informed, promised and assured the Union, that Respondent would increase its wage rates as soon as the other Mills in the locality increased theirs (R. 165, 166, 170, 173).

Respondent did not conceive itself to be under any duty to, and Respondent therefore did not, request a resumption of the bargaining which the Union had terminated.

No resumption of said bargaining had been requested or suggested by the Union; nor had the Union in any way indicated any desire or intent to ever, in any event, resume the bargaining which it had terminated (supra, p. 11).

As a courtesy, nothing more nor less, Respondent sent for the President and other members of the Bargaining Committee of the Union who were available and informed them that the situation which had been anticipated during the bargaining had arisen and that Respondent, as it had repeatedly said that it would, was about to announce wage rate increases sufficient to maintain its long standing position of always paying wage rates a bit higher than the level of rates in the community, being approximately the increases which the Union had requested during the bargaining (R. A. 188-189).

Respondent also mailed detailed schedules of the wage increases which it was making to Mr. Douty, the Georgia State Director of the Union, and exhibited copies of said Schedules to the President and Members of the Bargaining Committee of the Union (R. A. 188-189, Board's Exhibit 12 A-F, B. A. 130-135).

The President and Members of the Bargaining Committee of the Union expressed approval of and appreciation for said wage increases (R. A. 188). No one, on behalf of the Union, then or thereafter requested or suggested any further bargaining.[10]

Summarizing This Fully Substantiated Statement of the Case, Respondent Submits:[11]

a) That the controlling facts are:

That the Union, without fault of respondent, terminated the collective bargaining, first on October 18, 1945, again, after resumption, on November 8, 1945, and again, this time finally and completely, without then or thereafter indicating any desire or intention of ever, under any cir-

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10 Respondent does not contend that it bargained with the Union on January 1, 1946, nor does Respondent raise, in this Court, any issue of fact as to whether notifying the Union that it was making substantially the wage increase which the Union had requested amounted to "consulting with the Union." Respondent does submit that, if the January 1, 1946, wage increase would have afforded any basis for closing the contract, it seems reasonable to assume that the Union would have requested a resumption of negotiations as soon as it learned of said wage increase. We submit also that, if the January 1, 1946, wage increase did not afford any basis for closing the contract, there was no conceivable need or purpose for Respondent to do anything more than inform the Union that it had, because of the increases being made throughout the industry, determined to make substantially the increase which the Union had requested before it terminated the bargaining. Attention is also directed to the fact that Respondent thereafter (infra, pp. 43 to 52) bargained with the Union with respect to two additional wage increases, and finally agreed with the Union upon a contract, but that the Union still refused to sign the contract.

11 The facts here stated all appear from the record now before the Court. The post-hearing facts alleged and relied upon as a further reason why the order should not now be enforced, are set forth in the argument of that contention (infra, pp. 43 to 52).

cumstances, resuming bargaining, on December 19, 1945; and that no further collective bargaining was pending, requested or anticipated when the complained of wage increase was made; and

b) **That the pertinent background and collateral facts are:**[12]

1) That Respondent bargained with the Union in complete good faith, in a sincere effort to agree with the Union upon a contract, and almost succeeded in its effort to persuade the Union to agree upon a contract;

2) That Respondent continued to bargain with the Union notwithstanding the threat of strike, resumed bargaining after the first two terminations thereof by the Union, and at all time demonstrated a willingness to bargain in good faith whenever requested to do so;

3) That Respondent bargained with the Union in good faith with respect to wages, and that the situation complained of would not have arisen if the Union, instead of terminating the bargaining, had accepted the proposals for further bargaining which Respondent made during the bargaining; and

c) That Respondent, in making said wage increase, simply did what it had, throughout the bargaining, informed,

12 Respondent verily believes that the record before the Court clearly shows that the parties failed to reach agreement in collective bargaining, and that the Union terminated the bargaining negotiations, solely because, from October 17, 1945 through December 19, 1945, the Union was bargaining for its own security and the collection of its own dues, to the complete exclusion of any bargaining for the benefit of the employees and to the complete exclusion of performance of its duties as the collective bargaining representative of the employees. See pages 11-16 of Respondent's brief in opposition to the petition for certiorari. See also the fact that when the parties, after the issuance of the order sought to be enforced, did finally reach agreement upon a contract, the Union refused to sign it for this and no other reason (infra, pp. 43 to 52).

This collateral fact is not here stated as a fact because some, but by no means all, of the testimony in that regard was contradicted; and we are here stating only the facts which were unquestionably established without contradiction or dispute.

promised and assured the Union that it would do, namely, increase its wage rates as soon as it learned that the other Mills in the locality were about to increase theirs.

None of these facts are mentioned in Petitioner's brief, nor did the Board make any findings, pro or con, with respect to any of them, although findings with respect to all of them were insisted upon by Respondent in its Exception to the Intermediate Report of the Trial Examiner (R. 34-54).

The Board did find (R. 60, 61-62, 110, infra, pp. 54 to 55) that Respondent violated the law in no other way than by making a general increase in its wage rates without consulting the Union; and we respectfully submit that the questions at issue should be controlled by the true facts pertinent thereto, and that, in the absence of findings to the contrary by the Board, the Court should, and of necessity must, look to the evidence for the facts; and that effect should be given to proof which is uncontradicted and corroborated.

"SPECIFICATION OF ERRORS TO BE URGED."

For the most part, the "errors" specified at pages 18-19 of Petitioner's brief were not committed. None of them are at all relevant to the facts or to the true issues in the case. They relate at best to unnecessary dicta in the opinion of the Circuit Court; and we submit that the judgment of the Circuit Court should not be reversed even though this Court feels that the obviously incorrect dicta in the opinion of the Circuit Court should be publicly disapproved.

1. The Circuit Court did not hold that a mere impasse in bargaining negotiations authorizes an employer to institute unilateral changes in rates of pay. The Circuit Court, on the facts of this case, correctly held that Respondent did not refuse to bargain with the Union by unilaterally increasing its wage rates after the Union had completely terminated the bargaining, "had withdrawn from further bargaining," and where no further bargaining was pending, requested or anticipated when the wage increase was granted. The Circuit Court simply held, in effect, that Respondent did not refuse to do what it was not requested or under any duty to do.

2. Nor did the Circuit Court hold that the taking of a strike vote authorizes an employer to effectuate unilateral changes in rates of pay. Respondent bargained with the Union in good faith after and notwithstanding the notice of intent to strike, and made substantial concessions from its previous bargaining insistencies in a further effort to reach agreement with the Union on a contract. The incidental reference to the strike vote in the opinion of the Circuit Court was not appropriate to the facts of the case or to the contentions of Respondent and was not necessary

to the judgment entered. The judgment of the Circuit Court should not be reversed even though this Court feels called upon to again say that neither a threat of strike nor a strike justifies a refusal by an employer to resume and continue collective bargaining whenever requested to do so.

3. Nor did the Circuit Court hold that anticipated wage increases by competitors in the labor market authorize an employer to effectuate unilateral changes in rates of pay. The Circuit Court, on the facts of this case, simply held that where collective bargaining has been terminated by the Union without fault of the employer, and no further bargaining is pending, requested or anticipated, an employer may unilaterally increase its wage rates so as to maintain its position in a highly competitive labor market.

4. Paragraph 4 is a mere generalization which does not merit comment.

5 and 6. Respondent did not contend, and the Court below did not hold, that the Board's order should not be enforced because it had already been complied with. Respondent expressly disclaimed any such contention.[13] Re-

[13] The following is quoted from pages 49-50 of Respondent's brief in the Circuit Court:

> "We do not rely, merely, upon the facts, although they are facts, that Respondent has fully complied with said order, and that said order has fully served its intended purposes and is now stale. (Same emphasis in Circuit Court brief.)
>
> "Our contention is that the Union, by its conduct after the hearings before the Trial Examiner and the issuance of said order, made it impossible for Respondent to comply with said order, and that, Respondent's efforts to bargain with the Union having been frustrated by the continued refusal of the Union to recognize and perform its agency responsibilities and bargain in good faith, Respondent has been relieved of any duty to bargain with the Union; and that the order sought to be enforced should not, for that reason, be enforced."

The incomplete quotation, at page 17 of Petitioner's brief in this Court, is needlessly misleading.

spondent contended and the Circuit Court held that the Board's order should not be enforced because it should not have been issued. Respondent also contended, as a further reason why the order should not be enforced, that the Union, by its conduct after the hearings before the Trial Examiner and the issuance of said order, made further compliance with said order unreasonable if not impossible, and Respondent requested appropriate opportunity to prove the facts alleged. Any reliance by the Circuit Court upon unproven allegations of facts was unrequested and obviously erroneous; but Respondent should not, on that account, be deprived of the prayed for opportunity to prove the facts alleged; nor should the obviously correct judgment be reversed because of obviously incorrect dicta in the opinion of the Court below.

7. Paragraph 7 is also a mere generalization which does not merit comment.

SUMMARY OF ARGUMENT.

Respondent takes issue with very little of the argument which is made in Petitioner's brief. Most of it, as abstract law, is entirely sound. The trouble is that it is not at all related to the true facts or to the true issues in his case.

Respondent does not contend that an employer may unilaterally increase its wage rates in disregard of requested or pending collective bargaining, or that a mere impasse in collective bargaining negotiations, or a threat of strike, or an actual strike, relieves an employer of the duty to resume and continue collective bargaining whenever requested to do so.

Nor does Respondent contend that anticipated or actual wage increases by competitors in the labor market authorize or justify a unilateral wage increase in disregard of pending or requested collective bargaining negotiations.

Nor does Respondent contend that enforcement of an order of the Board should be denied merely because the order has been fully complied with and has fully served its intended purposes.

Nor does Respondent contend that any Court should ever rely upon unproven allegations of fact, no matter how earnestly asserted.

Nor does Respondent take issue with the argument of Petitioner that the case should be remanded to the Board for findings as to the post-order facts alleged and relied upon by Respondent.

Respondent therefore takes issue with very little of the argument which is made in Petitioner's brief.

Respondent's argument, on the facts of this case, and the issues here involved, may be **summarized** as follows:

I.

The order sought to be enforced should not be enforced because it should not have been issued.

Respondent did not refuse to bargain by unilaterally increasing the wage rates of its employees on January 1, 1946, because:

The Union had, on December 19, 1945, completely and finally terminated all collective bargaining, without then or thereafter in any way indicating any desire or intention of ever resuming bargaining; and

No further collective bargaining was pending, requested or anticipated when said wage increase was made.

Bad faith cannot reasonably be inferred from the fact that Respondent did exactly what it had repeatedly informed, promised and assured the Union that it would do.

Respondent was not under any duty to request a resumption of the bargaining which the Union, without fault of Respondent, had completely and finally terminated.

There must be a request to bargain before there can be a refusal to bargain; and Respondent cannot be held to have refused to do what it was not requested or under any duty to do.

The judgment of the Circuit Court, denying enforcement of the order of the Board, should be affirmed, even though this Court feels that the obviously incorrect dicta in the opinion of the Circuit Court should be publicly disapproved.

II.

The order sought to be enforced, even if properly issued, should not now be enforced because the Union, by refusing to sign the contract which was agreed upon in collective bargaining after the issuance of said order, made further compliance with said order unreasonable if not impossible.

Respondent does not contend, and has not ever contended, that the order should not be enforced because it has been fully complied with and has fully served its intended purposes.

Respondent does contend that because the parties, after the hearings before the Trial Examiner and the issuance of said order, bargained to complete agreement on everything proposed or discussed except the issue as to whether the relationship of the employees to the Union should be voluntary or compulsory, and because the Union then refused to abide by the agreements made in bargaining and refused to sign the contract which was agreed upon, circumstances have arisen which affect the propriety of enforcement of said order, and said order should not now be enforced.

Respondent also contends that it should be afforded opportunity, somewhere, to prove the facts which it alleges. Respondent does not take issue with the argument of Petitioner (Petitioner's brief, pp. 48-53) that the case should be remanded to the Board for this purpose.

III.

The order, if enforced, should be modified.

Board orders should be remedial, and the remedy should not exceed the wrong.

An employer should not be enjoined from doing things which he has not done or given any indication of intending or of being apt to do; nor should he be ordered to do what he has willingly and in good faith done.

We do not refer, in this regard, to the facts which have occurred since the hearings before the Trial Examiner and the issuance of the order sought to be enforced.

The Board predicated its Decision and Order **solely** upon its affirmance of the Trial Examiner's finding that Respondent refused to bargain by increasing the wage rates of its employees without consulting the Union.

Respondent having violated the law, if at all, in no other way than by making a general increase in the wage rates of its employees without consulting the Union, this is the only wrong which needs to be, or which should be, remedied; and the order, if enforced, should be modified accordingly.

ARGUMENT.

I.

The Order Sought to Be Enforced Should Not Be Enforced Because It Should Not Have Been Issued.

Respondent Did Not Refuse to Bargain by Unilaterally Increasing the Wage Rates of Its Employees on January 1, 1946, After the Union, Without Fault of Respondent, Had Terminated the Bargaining, First on October 18, 1945, Again, After Resumption, on November 8, 1945, and Again, This Time Finally and Completely, Without Then or Thereafter Indicating Any Desire or Intention of Ever Resuming Bargaining, on December 19, 1945; and Where No Further Bargaining Was Pending, Requested or Anticipated When Said Wage Increase Was Made, and Respondent Had Resumed Bargaining, and Had Bargained in Good Faith, Whenever Requested to Do So, and the Situation Complained of Would Not Have Arisen if the Union, Instead of Terminating the Bargaining, Had Accepted the Proposals for Further Bargaining With Respect to Wages Which Respondent Had Submitted to It.

The controlling facts are that the complained of wage increase was made on January 1, 1946, after the Union, without fault of Respondent, had completely and finally terminated the bargaining on December 19, 1945; that the Union did not, on December 19, 1945 or thereafter, request any resumption of, or in any way indicate any desire or intention to ever resume, the bargaining which it had terminated; and that no further bargaining was pending, requested or anticipated when said wage increase was made.

All other of the facts stated are background or collateral thereto.

The controlling facts, above stated, although not mentioned by Petitioner, were fully established by the uncontradicted testimony of Respondent's witnesses and were corroborated by the testimony of the Board's principal witness. Mr. Douty, the Georgia Director of the Union, himself testified (infra, pp. 10-11) that no further bargaining was contemplated when the Union terminated the bargaining on December 19, 1945; and Petitioner does not contend, nor has the Union or the Board ever contended, that any resumption of bargaining was requested, or that any desire or intention to ever resume bargaining was in any way indicated by the Union, after the Union terminated the bargaining, for the third time, on December 19, 1945.

The controlling rules of law have been clearly and correctly established by this Court.

N. L. R. B. v. Columbia Enameling & Stamping Co., Inc., 306 U. S. 292, 297, 83 Law Ed. 660, 664:

> "Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.
>
> **"However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the**

statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining. * * * To put the employer in default here the employees must at least have signified to respondent their desire to negotiate. Measured by this test the Board's conclusion that respondent refused to bargain with the Union is without support, for the reason that there is no evidence that the Union gave to the employer . . ., any indication of its willingness to bargain . . . **The employer cannot, under the statute, be charged with refusal of that which is not proffered.**" (Emphasis added.)

N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 343-344, 83 Law. Ed. 682, 689-690:[14]

"When the representatives of the two parties separated on August 21, no further negotiations were pending, each had rejected the other's proposals, and there were no arrangements for a further meeting. On the following days the factory was closed.

"The Board finds that, in this situation, the respondent was under an obligation to send for the shop committee, and again to reason with its members or to wait until the situation became such that it could operate its whole plant without antagonizing the employees' views with respect to departmental seniority. We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. **There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employees.**" (Emphasis added.)

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14 See also, N. L. R. B. v. Whittier Mills, 123 Fed. 2nd 725; Great Southern Trucking Co. v. N. L. R. B., 127 Fed. 2nd 189 (1), 185; Reliance Mfg. Co. v. N. L. R. B., 125 Fed. 2nd 311, 315; N. L. R. B. v. West Kentucky Coal Co., 152 Fed. 2nd 198 (2).

Respondent therefore submits that there must be a request to bargain before there can be a refusal to bargain; and that

Respondent was not under any duty to request a resumption of the bargaining which the Union had completely and finally terminated; and that

Respondent cannot be held to have refused to do what it was not requested or under any duty to do.

Petitioner's brief ignores the facts that the Union completely and finally terminated the bargaining before the wage increase was made, and that no further bargaining was pending, requested or anticipated, when the wage increase was made. Petitioner's brief therefore does not meet the issue in the case.

Respondent does not contend that an employer may unilaterally increase its wage rates in disregard of pending or requested bargaining negotiations; and cases such as **May Department Stores Co. v. N. L. R. B., 326 U. S. 376**, and **Matter of Craddock-Terry Shoe Corporation, 73 N. L. R. B. 1339, 1342**, cited by Petitioner, are not at all relevant to the question here at issue.

In the **May Department Stores case**, the unilateral wage increase was simply a part of a pervading refusal to recognize the Union, and an unauthorized refusal to bargain with a Union which was diligently asserting and trying to exercise its bargaining authority. The Union, in that case, had been and was doing everything which it could do to bring about contract negotiations. The best that can be said of the Company, in that case, is that it was refusing to bargain because it erroneously disputed the Board's determination of the appropriate unit. In truth, the total circumstances clearly indicated a pervading refusal to respect the right of the employees to organize as provided by the National Labor Relations Act.

Here, Respondent had fully recognized the bargaining authority of the Union; had counter-proposed a complete contract; had earnestly endeavored to agree with the Union upon a contract; "the Union had withdrawn from further bargaining"; and no further bargaining was pending, requested or anticipated when the wage increase was made. The two cases are therefore entirely different.

In the **Craddock-Terry Shoe Corporation case** the Board found that "no impasse in bargaining had been reached" when the unilateral wage increase was announced. Actually, wage negotiations initiated by the Union had merely been postponed at the request of the Company to afford the Company an opportunity to study a War Labor Board Directive upon which the Union's wage proposals were based; and it was in this situation, so the Board found, that the Company, "motivated by a desire to undermine the C. I. O. as the employees' representative," unilaterally made the wage increase which the Union had proposed and which the Company had requested time to consider. There is no similarity between the cited case and the case now before the Court. In the cited case further collective bargaining was pending and requested when the wage increase was made. In the case now before the Court the bargaining had been terminated by the Union, without fault of Respondent, and no further bargaining was pending, requested or anticipated when the wage increase was made.

Nor does Respondent contend that a mere impasse in bargaining negotiations relieves an employer of the duty to resume and continue collective bargaining negotiations whenever requested to do so; and the cited case of **Jeffrey-DeWitt Insulator Co. v. N. L. R. B., 91 Fed. 2d 134**, is not at all in point. Respondent here twice did exactly what the employer in the cited case wrongfully refused to do.

In the cited case the Company refused an express request to bargain. The refusal to bargain was admitted. The Company attempted to justify its action on the ground that an impasse in bargaining had occurred about a month earlier. The following is quoted from the decision in the cited case at page 136: "In asking that the order be set aside, the Company makes three contentions: . . . (2) that the Company was not guilty of an unfair labor practice in refusing to negotiate further after an impasse had been reached in negotiations. . . ."

The cited case would have been applicable if Respondent had refused to resume bargaining negotiations on November 7 or December 19, because of the terminations of bargaining which occurred on October 18 and November 8; but the undisputed, completely distinguishing facts are: (1) that Respondent, upon request, resumed bargaining and bargained in good faith on November 7 and 8 and December 19, 1945 and (2) that no resumption of bargaining was requested, and that no desire or intention of the Union to resume bargaining was in any way indicated, after the Union finally terminated the bargaining on December 19, 1945.

Respondent does not contend, and has not ever contended, that a threat of strike, or an actual strike, relieves an employer of the duty to resume and continue collective bargaining negotiations whenever requested to do so. On the contrary, the Union gave notice of its intention to strike on October 18 and 22, 1945 (the strike did not actually commence until after the hearings before the Trial Examiner had been completed), and Respondent, upon request, resumed and continued bargaining on November 7 and 8 and December 19, 1945; and, in a further effort to reach agreement with the Union, made substantial concessions which it was reluctant, and had previously declined, to make. Respondent therefore submits

that such cases as **N. L. R. B. v. Mackey Radio & Telegraph Co., 304 U. S. 333**, and **N. L. R. B. v. Reed & Prince Mfg. Co., 118 Fed. 2nd 874**, are not at all pertinent to the merits of this case; and that the judgment of the Circuit Court, denying enforcement of the Board's Order, should be affirmed even though the dicta in the opinion of the Circuit Court is disapproved.

Nor does Respondent contend that a Union, in the face of an adamant and continuous refusal to bargain, must continually renew the request to bargain which it has made and which is still pending; and the case of **Ritzwoller Co. v. N. L. R. B., 114 Fed. 2nd 432, 436**, cited by Petitioner, is not relevant to any issue now before the Court.

In the **Ritzwoller case** the employer tenaciously avoided all efforts of the Union to commence negotiations upon the contract which the Union had proposed, and a strike was called. The employer was informed that the strike would be called off if the employer would recognize the Union and commence bargaining negotiations. The employer replied that it had nothing to discuss with the Union at that time. The employer had the Union's proposal, to which it had made no reply, and the Court merely held that it was not incumbent upon the Union, in this situation, to continually renew the proposal.

The situation here was almost diametrically different. Respondent submitted a complete counter proposal to the Union at the first bargaining conference and collective bargaining continued with more than usual success until the Union abruptly terminated the bargaining negotiations. Respondent was earnestly trying to reach agreement with the Union upon a contract and proposed that the contract be closed with provisions for further collective bargaining with respect to wages in the event of a change in the then

prevailing economic situation. Two cases could hardly have less in common.

Nor does Respondent contend that anticipated or actual wage increases by competitors in the labor market authorize or justify a unilateral wage increase in disregard of pending or requested collective bargaining.

The point here is that no further bargaining was pending, requested or anticipated when the complained-of wage increase was made.

Respondent has stated the facts surrounding the making of the wage increase, as collateral to the controlling facts, merely because the Board, while predicating its affirmance of the Trial Examiner's findings **solely** upon the ground that Respondent refused to bargain by granting a wage increase to its employees without consulting the Union (R. 60, infra, p. 54), tossed in an inference that Respondent did not bargain in good faith with respect to wages prior to the Union's termination of the bargaining.

While the possibility of an industry-made wage increase was contemplated during the bargaining, neither party had any inkling that it would come so quickly. The testimony that Respondent first learned of the increase on Friday or Saturday preceding the Monday (New Year's Day) on which Respondent announced the increase, was undisputed. The record is silent as to whether the Union, through its contacts with other mills, had any advance notice of the increase. If it did it did not impart the information to Respondent; nor did it request further bargaining, although it had been repeatedly assured that Respondent would increase its wage rates as soon as it learned that the other mills were about to increase theirs.

Between the termination of the bargaining and the granting of the wage increase, the economic situation totally

changed. There was no reason during the bargaining, from August 31, 1945, through December 19, 1945, why Respondent should increase its wage rates, which were already higher than the rates being paid by the other mills with which it competed for labor. There was every reason why Respondent should, as it did do, maintain its historical position of always being among the first of the comparable mills to grant any wage increase, and its competitive position of paying wage rates somewhat above the rates paid by its competitors in the labor market.[15]

Not only did the economic situation change, but we respectfully submit that bad faith cannot reasonably be inferred from the fact that Respondent did exactly what it had repeatedly informed, promised and assured the Union that it would do.

Throughout the bargaining, Respondent repeatedly explained and justified its refusal to grant the wage increase which the Union was requesting, by demonstrating to the Union that the wage rates which it was then paying were higher than the rates then being paid by the other comparable mills, and were higher, in fact, than the rates which the War Labor Board was then permitting comparable mills to pay. The duty to bargain does not include any duty to agree; and a fully justified and carefully explained refusal to grant a wage increase cannot be called a refusal to bargain.

Respondent, throughout the bargaining, also repeatedly informed, promised and assured the Union that it would maintain its historical position of always being among the first of the comparable mills to increase wages and its competitive position of paying rates somewhat higher than the rates paid by its competitors, and that it would increase its wage rates just as soon as it learned that the

[15] N. L. R. B. v. Whittier Mills, 123 F. 2nd 725.

Mills with which it competed for labor were about to increase theirs.

This is exactly what, and all that, Respondent did; and we confidently say that the fact that Respondent did exactly what it said that it was going to do, does not indicate bad faith, either in doing it or in saying that it was going to do it.

Respondent, moreover, offered to provide in the contract being negotiated: (a) that the matter of wages might be made the subject of further collective bargaining at any time; and (b) that its wage rates would not be increased or reduced unless and until a general adjustment of wage rates was agreed upon in collective bargaining between Respondent and the Union.

We say also that Respondent cannot reasonably be charged with bad faith because the Union rejected the counter-proposals which Respondent submitted to it; especially not, where the situation complained of would not have arisen if the Union, instead of terminating the bargaining, had accepted Respondent's counter-proposals.

Petitioner's brief cites a mass of cases, but the controlling case of **N. L. R. B. v. Columbia Enameling & Stamping Co.**, supra, page 32, is mentioned in a footnote only. Petitioner's brief does not at all meet the question at issue.

We have not ever contended that Respondent bargained with the Union on January 1, 1946; and we do not here insist upon the contention that Respondent "consulted with the Union" by informing the Union that, the situation anticipated during the bargaining having occurred, Respondent was going to do exactly what it had, throughout the bargaining, informed, promised and assured the Union that it would do; namely, increase its wage rates

(in an amount substantially equal to the increase requested by the Union) so as to maintain its historical position of always being among the first of the comparable mills to grant any wage increase, and its competitive position of paying wage rates somewhat higher than the rates paid by the other mills in the locality.

The Board found that this did not amount to consulting with the Union; and we assume that the Court will deem itself bound by this finding even though it should feel inclined to disagree with it.

We do insist that the Board was not justified in inferring bad faith from the fact that Respondent did what it always said that it would do.

We do also, parenthetically, call attention to footnote 10, at page 21 hereof; and we direct attention to the fact (alleged but not yet proven) that when Respondent did bargain with the Union regarding the wage increases which were made on March 13, 1946 and July 30, 1946 (infra pp. 44 and 49), no ultimate good was accomplished. The Union, although it approved the wage increases, still refused to sign the contract which was agreed upon (infra p. 49).

Our contention, on the record now before the Court, is that when the Union terminated the collective bargaining on December 19, 1945, "withdrew from further bargaining" (R. 125), it reassumed the obligation to initiate further bargaining if further bargaining was desired; and that it was not up to Respondent to request a resumption of the bargaining which the Union had elected to terminate.

The issue is a narrow one and we do not want to be misunderstood. As long as collective bargaining was pending, Respondent could not, and did not, act unilaterally.

We do not contend that the Union, by terminating the bargaining, forfeited its bargaining authority. If the Union, after terminating the bargaining on December 19, 1945, had requested that bargaining be resumed, Respondent would have been obligated to resume bargaining. When a resumption of bargaining was requested (by the Conciliator) on November 7, 1945, after the Union had terminated the bargaining on October 18, 1945, Respondent did resume bargaining and, on November 7 and 8, 1945 made substantial concessions which it did not want to make but which it did make because it did want to reach agreement on a contract, and because it recognized its duty, under the Statute, to bargain in good faith whenever requested to do so.

The Union again terminated the bargaining on November 8, 1945 and Respondent, upon request, again resumed bargaining on December 19, 1945.

The Union again terminated the bargaining on December 19, 1945. Mr. Douty, the Georgia Director of the Union, testified that no further bargaining was then contemplated; and no one contends, or has ever contended, that the Union, at any time thereafter, ever requested that the bargaining be resumed or in any way indicated any desire or intention of ever resuming the bargaining which it had elected to terminate.

We submit, therefore:

a) That no collective bargaining was pending, requested or anticipated when the wage rates were increased on January 1, 1946;

b) That it was not up to Respondent to request a resumption of the collective bargaining which the Union had terminated;

c) That Respondent cannot be held to have refused to do what it was not requested or under any duty to do;

d) That the order sought to be enforced should not be enforced because it should not have been issued; and

e) That the judgment of the Circuit Court should be affirmed even though the dicta in its opinion is disapproved.

This is the primary question at issue. The other questions hereinafter discussed are subsidiary thereto and, so far as concerns the proper disposition of the case, need not be considered if the foregoing primary question is determined according to our contentions.

II.

Circumstances Have Arisen Which Affect the Propriety of Enforcement of the Order Sought to Be Enforced.

The Union, by Refusing to Sign the Contract Which Was Thereafter Agreed Upon in Collective Bargaining, Made Further Compliance With Said Order Unreasonable if Not Impossible.

Respondent Should Be Afforded Leave to Prove the Facts Alleged.

The applicable rule of law was clearly established by this Court in **N. L. R. B. v. Jones & Laughlin, 321 U. S. 416, 428, 91 L. Ed. 1578 (8) 1582,**

> "When circumstances do arise after the Board's Order has been issued which may affect the propriety of enforcement of the order, the reviewing Court has discretion to decide the matter itself or to remand it to the Board for further consideration."

The only question is as to whether the facts which we have sought, and still seek, leave to prove, come within the above quoted rule.

We did not ask the Circuit Court to rely upon our mere assertion of facts. Nor did we, nor do we, contend that enforcement of the order should be denied merely because the order has been fully complied with, has fully served its intended purpose, and is now stale.[16] We did and do contend that the Board's Order, even if properly issued, should not now be enforced because the Union, after the hearings before the Trial Examiner and the issuance of said order, so completely frustrated Respondent's repeated and earnest efforts to bargain with the Union that Respondent should not now be ordered to bargain with the Union; and we did and do contend that some Court should, somewhere, afford us opportunity to prove the pertinent facts.

Reference is made to Paragraph 5 (R. 121) and to the prayer (R. 121) of our response to the Board's petition for enforcement. The following, in more detailed statement, are the facts upon which we rely and which we ask leave to prove.

1.

The complained of wage increase was made on January 1, 1946. The hearings before the Trial Examiner were held on February 20 and 21, 1946 (R. 70); the Intermediate Report of the Trial Examiner was issued on March 25, 1946 (R. 104); the long threatened strike started on April 18, 1946 (infra, paragraph 3), the Board issues its Decision and Order on August 21, 1946 (R. 64); and the strike was abandoned by the employees on August 26, 1946 (infra, paragraph 10). The petition for enforce-

[16] See note 13, p. 25.

ment of the Board's order was filed more than a year later, on December 8, 1947 (R. 1).

2.

During the early part of March, 1946, another general wage increase spread throughout the textile industry. Respondent, still desiring to maintain its position of paying wage rates somewhat higher than the rates paid by the other mills with which it competes for labor, and desiring also to avoid the trouble and expense of further, unwarranted, unfair labor practice charges, requested a conference with the Union and proposed wage rate increases which averaged 6¢ per hour per employee. The requested conferences were held on March 12 and 13, 1946, and it was agreed that the increases proposed by Respondent should be made effective as of March 11, 1946, the first day of the work week. No contract negotiations occurred at these conferences.

3.

Employee members of the Union Bargaining Committee thereafter expressed a desire to resume negotiations for a contract without provisions for the security of the Union or the check-off of the Union's dues, and bargaining conferences were convened and held on April 16 and 17, 1946. Respondent offered to contractually obligate itself for a Christmas Bonus in addition to the paid vacations which it had previously proposed, and tentative agreement was reached at these conferences, on the matters of Vacations and Christmas Bonus (Article V, Respondent's Exhibit 4) and Union Solicitation On Company Time (Section 3 of Article VIII, Respondent's Exhibit 4). It looked as though the parties were on the way to a contract. However, at the conference on April 17, 1946, Mr. Douty, the International Union representative, contrary to the an-

nounced desire of the employee members of the Bargaining Committee, renewed the Union's demands for compulsory Union membership and the check-off of dues, and again stated that the International Union would not permit the signing of any contract which did not include adequate provisions for the security of the Union and the check-off of its dues. The April 17 conference was devoted, almost entirely, to a repetition of the discussion of these issues, and no further progress was made. Respondent urged the Union to continue negotiations with respect to the other provisions of the contract which had not been agreed upon, but the Union broke off and terminated the negotiations and the long-threatened strike was called by the Union and started the next day, April 18, 1946.

4.

A conference, in an effort to settle the strike, was convened by, and held in the offices of, the Conciliation Service of the United States Department of Labor, in Atlanta, Georgia, on May 30, 1946. Argument with respect to Union security and check-off consumed the entire conference, and no agreements were reached.

5.

The conference last referred to was adjourned to reconvene on June 1, 1946, with the express understanding that the discussions would be confined to contract provisions with respect to the controverted incentive wage plan and work loads and work assignments under said plan. Respondent prepared amendments to its work load and work assignment proposals, and representatives of Respondent and the employee members of the Union Bargaining Committee met, in the offices of the Conciliation Service, at the appointed time. After waiting several

hours, those present were informed by telephone that Mr. Douty, the International Union representative, would not be able to attend the conference. It was agreed that negotiations in Mr. Douty's absence would be useless, and the conference dispersed.

6.

Further negotiations were held in the Conciliation Service offices in Atlanta on July 2 and 3, 1946. At the opening of these conferences, Respondent submitted to the Union the amendment to its proposals with respect to the incentive wage plan and work loads and work assignments under said plan which it had prepared for submission at the conference on June 1, 1946. The conferences on July 2 and 3, 1946, were, for several hours, devoted to a thorough discussion of these issues (the first such dscussion which the parties had ever had); and, after an almost complete re-writing of Respondent's proposals, tentative agreements were reached with respect to these provisions of the contract. Mutually acceptable modifications were also made in all other provisions of the contract which Respondent had proposed, and the entire contract, as modified, amended and re-written during the bargaining negotiations, was tentatively agreed to. The International Union representative thereupon again insisted upon including in the contract provisions for the security of the Union and the check-off of its dues; and, when Respondent refused to compel employees to become or remain members of the Union, or pay dues to the Union, the Union broke off the negotiations and the conference was adjourned.

7.

Another general wage increase spread throughout the cotton textile industry during the latter part of July, 1946.

In the hope that a further negotiated wage increase would induce the Union to terminate the strike and sign the contract which had been tentatively agreed upon, a further bargaining conference was requested by Respondent and was held in the Conciliation Service offices in Atlanta on July 30, 1946.

8.

Respondent opened the conference on July 30, 1946, by offering to increase all hourly wage rates 8¢ per hour and to increase all incentive rates so that earnings under the incentive wage plan, at somewhat less than the average rate of production then prevailing in the mill, would be increased 8¢ per hour.

9.

In response to the above proposal, Mr. Douty, the International Union representative, stated that the Union was settling its then current wage demands with other mills for an increase of 8¢ per hour, and that the wage increase proposed by Respondent was in line with the increases which were being agreed upon with and made by other mills. He thereupon inquired whether there had been any change in Respondent's attitude toward Union security and the check-off of the Union's dues. Upon being informed that Respondent was of the same opinion still, Mr. Douty requested a recess for a discussion between him and the employee members of the Committee. After the recess, which lasted forty minutes, Mr. Douty, informed Respondent that, without adequate Union security and dues deduction provisions, it would be impossible to agree upon a contract. Employee members of the Union Bargaining Committee asked Mr. Douty, in the presence of Respondent's representatives, whether the Local Union might not be permitted to sign a contract without

Union security and check-off provisions, and Mr. Douty replied that it would not be. The conference thereupon adjourned without any agreement having been made with respect to the wage increase which Respondent had proposed.

Approximately one-half of the employees (many of whom had refused to strike) were already back at work, and the wage increases proposed by Respondent were made effective as of the first day of that workweek.

10.

On August 21, 1946, the Board issued its decision that Respondent had bargained with the Union in good faith with respect to the incentive wage plan and had only committed an unfair labor practice by increasing its wage rates without consulting the Union. The strike was completely abandoned, and all employees returned to work, on August 26, 1946. Respondent is informed and believes, and alleges that the employees abandoned the strike because they finally realized that they were striking for the security of the Union and the deduction of the Union's dues from their wages, and not for any purpose of benefit to them.

11.

Most of the employee members of the Union Bargaining Committee resigned. The Union elected, or appointed, a new Bargaining Committee, and a further bargaining conference was convened and held on September 19, 1946.

12.

Respondent submitted to the conference, held on September 19, 1946, a complete draft of the contract which had been tentatively agreed upon in prior bargaining ne-

gotiations, and Respondent offered to sign, and urged the Union to sign, this contract. A copy of the index to this contract is set forth in the Appendix to Respondent's Brief in the Circuit Court (R. A. 191), and Respondent offers to introduce said entire contract in evidence when and if afforded an opportunity to do so.

13.

The Union refused to sign the contract which had been tentatively agreed upon, and renewed its demands for the inclusion in the contract of provisions to compel the employees to continue membership in the Union and to provide for the check-off of the Union's dues. The Union again stated that it would not sign, or permit the signing of, any contract which did not include any such provisions. Respondent again refused to compel employees to become or remain members of the Union or to pay dues to the Union, and the Union again broke off and terminated the bargaining negotiations.

14.

When the bargaining first started, back on August 31, 1945, it was mutually agreed that all bargaining agreements would be tentative and not binding unless and until a complete contract was agreed upon. When the Union, on September 19, 1946, refused to sign the contract which had been tentatively agreed upon, all tentative bargaining agreements were mutually withdrawn, it then being obvious to all concerned that further bargaining negotiations would be useless.

These are the facts which we allege and pray for opportunity to prove. Although our response to the Board's petition for enforcement was verified (R. 119, 122) and has never been denied, we did not ask the Circuit Court,

and we do not ask this Court, to rely upon our verified allegations without further proof. We do not take issue with the argument of Petitioner that the case should be remanded to the Board for the purpose of taking the proffered proof and making findings with respect thereto. We do say that circumstances have arisen on account of which the order should not now be enforced, and we do pray for opportunity to prove the facts alleged.

The bargaining authority of the Union was certified on August 13, 1945, more than three and one-half years ago. The complained of wage increase was made on January 1, 1946, a little more than three years ago. Collective bargaining negotiations, with interruptions for which the Union alone was responsible, extended over a period of more than a year.

The parties reached agreement, through collective bargaining, on every part of the contract being negotiated for as to which any possibility of agreement existed—on everything which had been proposed or discussed, except compulsory membership in and payment of dues to the Union.

Agreement was reached with respect to rates of pay and wages (including the administration of the incentive wage plan), hours of work and all conditions of employment pertinent to the relationship between the employer and the employee (R. A. 191).

The only disagreement was as to whether the relationship of the employees to the Union should be voluntary or compulsory. The Union, anticipating that the employees would not maintain membership in and pay dues to the Union unless compelled to, insisted that Respondent agree to discharge any employee who failed or refused to maintain membership in or pay dues to the Union. Re-

spondent refused to do so. Bargaining on this issue had extended over a period of more than a year, and it was obvious that no possibility of agreement existed.

Agreement having been reached on everything else which had been proposed and discussed, Respondent put into final form, and offered to sign, and urged the Union to sign, the contract which had been agreed upon (R. A. 191). The Union refused to sign the contract. The results of more than a year of collective bargaining were thereby nullified, and it was mutually acknowledged that further bargaining would be useless.

We do not rely upon the fact that Respondent has fully complied with the order, and we do not take issue with such cases as **N. L. R. B. v. Pennsylvania Greyhound Lines, 303 U. S. 261, 271**, and the other cases cited at pages 44-48 of Petitioner's brief.

We rely upon the decision of this Court in **N. L. R. B. v. Jones and Laughlin, 331 U. S. 416, 428, 91 Law. Ed. 1575 (8) 1582**, "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing Court has discretion to decide the matter itself or to remand it to the Board for further consideration."

And upon the fact that the Union, by refusing to sign the contract which was agreed upon in collective bargaining after the hearings before the Trial Examiner and the issuance of the order sought to be enforced, made further compliance with said order unreasonable, if not impossible, and that Respondent should not be ordered to again do a useless thing.

And we ask leave to prove the facts alleged.

III.

The Order, if Enforced, Should Be Modified so as to Restrict It to the Only Unfair Labor Practice Found to Have Been Committed, Namely, Making a General Wage Increase Without Consulting the Union.

Board orders should be remedial and the remedy should not exceed the wrong. An employer should not be enjoined from doing things which he has not done or given any indication of intending or of being apt to do; nor should he be ordered to do what he has willingly and in good faith done.[17]

The law in this regard has been clearly established by the decisions of this Court in **N. L. R. B. v. Express Publishing Co., 312 U. S. 426, 85 L. Ed. 930**; and **May Department Stores v. N. L. R. B., 326 U. S. 376, 90 L. Ed. 145**; and any further citations would merely add to the length of this brief, which is already longer than we would like for it to be.

The Trial Examiner purported to find:

(a) That Respondent did not bargain with the Union in good faith with respect to the incentive wage plan; (b) that Respondent interfered with, restrained and coerced its employees in violation of Section 8(1) of the National Labor Relations Act; and (c) that Respondent refused to bargain with the Union, in violation of Section 8(5) of said Act, by increasing its wage rates on January 1, 1946, without consulting the Union.

The Board found:

(a) That Respondent bargained with the Union in complete good faith with respect to the controverted incentive

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[17] We do not rely in this regard upon the post-order facts alleged in the preceding section of this brief. The argument here made is predicated on the record now before the Court.

wage plan (R. 61-62), and (b) that Respondent did not interfere with, restrain or coerce its employees in violation of Section 8(1) of said Act (R. 62 and 110).

The Board predicated its decision and order **solely** upon its affirmance of the Trial Examiner's finding that Respondent refused to bargain, in violation of Section 8(5) of said Act, by increasing the wage rates of its employees on January 1, 1946, without consulting the Union (R. 60, 61-62).

The following portions of the decision of the Board are quoted in substantiation of the statements just made, to-wit:

> (R. 60) "1. The Trial Examiner found that the respondent, in violation of Section 8(1) and (5) of the act, failed to bargain collectively with the Union as the statutory representative of the respondent's employees by refusing to furnish the Union with certain detailed information relating to the incentive wage plan and by granting a wage increase to its employees without consulting the Union. **Although we agree with the Trial Examiner's conclusion, we, however, rest our determination solely on the latter ground.**" (Emphasis added.)
>
> (R. 61-62) "With respect to the respondent's refusal to comply with the Union's request for certain information concerning its Point Plan (incentive wage plan), we, unlike the Trial Examiner, are not persuaded that, on the facts of this case, the respondent thereby manifested bad faith. In view of the respondent's invitation to the Union to conduct its own engineering studies at the plant, and under all the circumstances of this particular case, including the evidence of substantial counter-proposals on many other issues,

we find that this part of the respondent's conduct was not violative of Section 8(5) of the Act. The effect of such conduct in a different context is not before us for decision here."

The Board also found that there was no basis for the customary, almost automatic, 8(1) charges of interference; and there has not been, nor could there be, any intimation of any attempt to discredit or destroy the Union, or of any resentment of or opposition to the decision of the employes to organize for the purposes of, and engage in, collective bargaining.

(R. 110) "It Is Further Ordered that the Complaint, insofar as it alleges that the respondent, by vilifying, disparaging, and expressing disapproval of the Union, has interfered with, restrained, and coerced its employees, within the meaning of Section 8(1) of the Act, be, and it hereby is, dismissed."

The Board did, of course, hold that the so-called unilateral wage increase technically violated Section 8 (1) as well as Section 8 (5) of the Act. In **N. L. R. B. v. Express Publishing Co.**, supra, this Court, p. 433, said:

"But we think it does not follow that, because the act of respondent which the Board has found to be an unfair labor practice defined by Section 8 (5) is also a technical violation of Section 8 (1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth."

The Trial Examiner said in his Intermediate Report (R. 99):

> . . . the undersigned is not convinced upon the evidence that danger of the commission of other unfair labor practices is to be anticipated from the respondent's conduct in the past sufficient to justify a recommendation that the respondent be required to cease and desist from the commission of any other unfair labor practices. . . ."

Respondent violated the law, if at all, in no other way than by making a general increase in the wage rates of its employees without consulting the Union. This, therefore, is the only wrong which needs to be, or which should be, remedied.

The Record, particularly Respondent's Exhibits 3, 4 and 2, shows without contradiction or possibility of doubt that Respondent bargained with the Union in a most sincere effort to agree upon a contract.

The parties did not agree (until after the hearings before the Trial Examiner, see Part II, pages 43 to 52, hereof) upon contract provisions with respect to the incentive wage plan; but the Record shows, without dispute, that the Union rejected Respondent's amended proposal (Respondent's Exhibit 2) without reading it; and the Board found that Respondent bargained in good faith in this regard (R. 61-62). The failure to reach agreement with respect to Article II of Respondent's Exhibits 3 and 4 is therefore not chargeable to Respondent.

With this in mind, an examination of Respondent's Exhibits 3 and 4 will, we are confident, convince the Court that Respondent not only bargained in good faith, but almost succeeded in persuading the Union to make a contract.

When the Union terminated the bargaining for the first time, on October 18, 1945, the parties had already reached

agreement on 33 of the 39 sections and sub-sections of the proposed contract. Without lengthening this brief by a complete enumeration, these agreements covered such matters as: the recognition and exclusive bargaining authority of the Union; the rights and duties of the employees under the contract; reporting time pay; hours of work and premium pay for daily or weekly overtime or for work performed on the sixth or seventh consecutive day in a workweek; holidays and premium pay for holiday work; seniority, in all of its details; the procedure for adjusting grievances, including final arbitration if necessary;[18] strikes and lockouts; use of company bulletin boards by the Union; and for further bargaining at the expiration of the contract. (See Respondent's Exhibit 4.)

In reaching these agreements, Respondent assented to more than fifty separate changes in the contract which it had proposed (see interlineations, erasures and attached riders, Respondent's Exhibits 3 and 4); and thereby demonstrated, not by mere words, but by convincing actions, an open-minded desire to agree upon a contract.

As the order stands, Respondent is enjoined from refusing to bargain, and is affirmatively ordered to bargain, with respect to hours of work and other conditions of employment. Respondent not only bargained with the Union with respect to hours of work and other conditions of employment, it actually (prior to the hearings before the Trial Examiner) reached agreement with the Union with respect thereto. Why, then, should Respondent be enjoined from refusing to bargain, or order to bargain, with respect to hours of work and other conditions of employment?

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18 The only disagreement concerning the arbitration of grievances was as to whether the Impartial Umpire should be appointed by one of the Judges of the United States District Court, as contended by Respondent, or by the Commissioner of Conciliation of the Department of Labor, as contended by the Union.

We submit that even though the Court agrees with the Board that Respondent should be enjoined from making general increases in wage rates without consulting the Union, Respondent should not be enjoined from refusing to do, or ordered to do, what it had already fully done before the Board's Order was issued; and that the injunction should be limited to making general increases in wage rates without consulting the Union.

Even after the Union abandoned bargaining, and was relying upon the economic force of a threatened strike to accomplish its demands, Respondent, although naturally and properly reluctant to at all appear to capitulate to a threat of force,[19] fully recognized and performed its duty, under the law, to bargain with the Union in good faith whenever requested to do so.

There was no finding, nor any evidence, nor any contention, that Respondent ever interfered with any effort of the Union to bargain with it. On the contrary, the evidence shows, without dispute, that the parties bargained with more than ordinary success from August 31, through October 17, 1945; that the Union abruptly terminated the bargaining and gave notice of intent to strike on October 18, 1945; that Respondent, upon request, resumed bargaining, and made substantial concessions from its previous bargaining insistencies, on November 7 and 8, 1945; that the Union terminated the bargaining again on November 8, 1945; that Respondent, upon request, again resumed bargaining on December 19, 1945; and that no further bargaining was thereafter requested or contemplated.

It is in this situation that the Board's Order, as it now stands, enjoins Respondent from "in any manner interfering with the efforts of" the Union to bargain with it

[19] Capitulation, or the appearance of capitulating, to a threat of force is seldom wise and is never pleasant.

[R. 63 (b)]. Respondent has never interfered with any bargaining effort of the Union, and there is no finding, or any basis for a finding, that it did. Respondent, on the other hand, diligently and in good faith, tried to persuade the Union to make a fair and proper contract, and almost succeeded in so doing. Remedy will, in this case, lose all relationship to wrong done, and to merit of the controversy, if Respondent is enjoined from interfering with the bargaining efforts of the Union.

It must be obvious that the purpose of the belated enforcement of the Board's Order is to try to revive employee interest in the Union. It may be that the policy of the law is to encourage the organization of unions, and that this Court should support that purpose. It cannot be that this Court should lend its support to distortions of fact, by enforcing orders from which it would appear (or could be made to appear) that an employer did things which it did not do, or refused to do things which it did do, or that an employer which bargained with a union in good faith whenever requested to do so, and sincerely tried to persuade the Union to make a contract, interfered with the bargaining efforts of the Union.

The Order of the Board, as it stands [R. 62-63, par. 1 (a)], broadly enjoins Respondent from "taking action, without prior consultation with said organization, with respect to rates of pay, wages, hours of employment and other conditions of employment."

Strictly construed, as it might conceivably be, such an Order would require prior consultation with the Union with respect to each of the innumerable and normal day-to-day activities which are immediately indispensable to the operation of any manufacturing business. Respondent has certainly done no wrong which merits such punishment.

The Board's Order, in this regard, goes far beyond the Order which was recommended by the Trial Examiner. The only unilateral action charged, complained of or found, was the general wage increase of January 1, 1946, and the recommendation of the Trial Examiner (R. 102 [b]) was that Respondent be ordered to cease and desist from "Unilaterally granting wage increases or making any other changes in wage rates of the employees in the aforesaid unit without consulting with said Union".

Respondent excepted to so much of the recommended order as related to other than general wage increases (R. 53, par. 5), but the Board did not rule on said exception.

In the normal day-to-day operation of any manufacturing establishment there are many decisions which must be made, and many actions which must be taken immediately and without opportunity for prior consultation in the nature of a collective bargaining conference. Collectively bargained contracts cannot, and normally do not, attempt to provide, in minute detail, for every situation which may arise. It is impossible to soundly do anything more in such contracts than agree upon controlling general principles and provide machinery for adjusting disagreements on account of the interpretation and application thereof. All of this Respondent tried to do, and Respondent should not be so severely penalized because the Union refused to effectuate the agreements which were reached.

The Board's Order, if enforced as it stands, would handicap Respondent in the operation of its mill more than Respondent would have been handicapped if the Union had executed the contract which was agreed upon.

For example, the parties agreed in collective bargaining that Respondent would have the right to make temporary job transfers without consulting the Union (Respondent's Exhibit 4, page 10) and that efficient operation of the mill required latitude in changing work assignments (Respondent's Exhibit 4, page 15). These, of course, are illustrations only, and many other such illustrations could be cited. The point is that the Union, for terminating the bargaining and refusing to sign the contract which was agreed upon, should not be rewarded by being given a greater strangle-hold on the operation of the business than it asked for when the bargaining was in progress.

The Board expressly found (R. 61-62, supra, pp. 54-55) that Respondent did not refuse to bargain with the Union regarding the application and administration of the incentive wage plan, and the order, if enforced, should certainly be clarified so as to preclude any possibility of its being construed so as to require prior consultation with the Union regarding the normal and necessary day-to-day administration of the incentive wage plan. Otherwise, the order might conceivably be construed so as to conflict with the only clear-cut finding of fact which the Board made.

Even though the Court, contrary to our primary contention, should hold that Respondent misconceived its duty, and that the January 1, 1946, general wage increase should not have been made without additional consultation with the Union, it certainly cannot be justly said that Respondent did any other wrong, and we respectfully submit that the order of the Board, if it is to be enforced, should be restricted to the making of general increases in wage rates without consulting the Union.

CONCLUSION.

Respondent respectfully submits:

I.

The Respondent did not refuse to bargain by increasing the wage rates of its employees without consulting the Union, after all collective bargaining had been completely and finally terminated by the Union, and at a time when no further collective bargaining was pending, requested or anticipated;

That the Order sought to be enforced should not be enforced, because it should not have been issued; and

That the judgment of the Circuit Court, denying enforcement of said order, should be affirmed, even though this Court feels that the inappropriate and obviously incorrect dicta in the opinion of the Circuit Court should be publicly disapproved.

II.

That said Order, even if properly issued, should not now be enforced, because the Union, by refusing to sign the contract which was thereafter agreed upon in collective bargaining, made further compliance with said Order unreasonable, if not impossible; and

That the case should be remanded, either to the Circuit Court or to the Board, we care not which, for taking proof and making findings with respect to Respondent's verified allegations in this regard.

III.

That, even if Respondent did refuse to bargain by unilaterally increasing the wage rates of its employees on January 1, 1946, it did no other wrong, and that the

Order, if it is to be enforced, should be modified so as to restrict it to the only wrong done.

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